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Doug Anderson

Alexandra Flynn

*Allard School of Law at the University of British Columbia, flynn@allard.ubc.ca*

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## RETHINKING ‘DUTY’: THE CITY OF TORONTO, A STRETCH OF THE HUMBER RIVER, AND INDIGENOUS-MUNICIPAL RELATIONSHIPS

Doug Anderson<sup>1</sup> and Alexandra Flynn<sup>2</sup>

The nation-to-nation relationship between Indigenous peoples and cities remains largely unexplored in the Canadian context.<sup>3</sup> This oversight is especially problematic in light of the significant percentage of Indigenous people who live in urban areas, and the many concerns that Indigenous and non-Indigenous peoples share. These shared concerns include the environment, land use, housing, social services, and much more, and modern municipalities do make attempts to address Indigenous-specific needs in these areas; but Indigenous-municipal relationships have implications that far exceed the technocratic and siloed ways in which Canadian systems generally approach these broad areas of concern - implications not only with regard for Indigenous people, but for all people. In many ways Indigenous people exist in the margins of cities (or Canada, or any modern nation, although this is changing<sup>4</sup>), and this marginalization has much to do with the ways in which Indigenous knowledge and perspectives are generally marginalized. However, Indigenous concerns include deeply principled relationships with all life and everything conceivable, since all layers of reality are inseparable, from Indigenous cultural perspectives. These principled relationships are reflected through Indigenous laws, which in turn have profound implications for how all law, and all relationships, may unfold in large urban centres, which are increasingly the predominating sites of human activity everywhere. Neglect of Indigenous-municipal relationships and of the consequences of municipal action on Indigenous peoples is an oversight affecting all our lives and all layers of being around us. Questions of Indigenous-municipal relations and the law are therefore urgent, and this urgency has motivated the authors to contribute to conversations on Indigenous and Canadian law in the municipal context.

Despite the importance of Indigenous-municipal relationships, cities have fewer legal obligations in respect of Indigenous peoples and First Nations than any order of government. Under the *Constitution Act*, municipalities may only exercise the authorities granted by provinces.<sup>5</sup> Canadian law understands provincial and federal governments as the ‘Crown’, while considerable uncertainty remains as to the role of municipalities in the unfolding of Indigenous-crown relationships. Several authors have examined the applicability of legal principles such as Honour of the Crown to municipalities, which includes an obligation to consult with Indigenous

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<sup>1</sup> [Placeholder for acknowledgments]

<sup>2</sup> This article would never have happened without dozens (hundreds?) of conversations with Doug Anderson, as well as the incredible work and wisdom of so many Indigenous community members who have worked tirelessly along the Humber River. My heart is full of gratitude for the many talks and walks, and the opportunity to sit in ceremony. Many thanks as well for the excellent suggestions of two anonymous reviewers. All errors and omissions are my own.

<sup>3</sup> See e.g. Felix Hoehn and Michael Stevens, “Local Governments and the Crown’s Duty to Consult” (2018) 55.4 Alberta Law Review, 971-1008; Shin Imai and Ashley Stacey. “Municipalities and the Duty to Consult Aboriginal Peoples: A Case Comment on Neskonlith Indian Band v. Salmon Arm (City)” (2014) 47.1 UBC Law Review 293-312.

<sup>4</sup> See esp Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014); and John Raulston Saul, *The Comeback, How Aboriginals Are Reclaiming Power And Influence* (Toronto: Random House, 2015).

<sup>5</sup> *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 at s 92(8) [Constitution Act].

peoples. This article contributes to these and other questions by asking how cities, in their relationships with Indigenous peoples, can look beyond existing legal principles to build relationships that may serve as the basis for subsequent legal agreements.<sup>6</sup> We focus on activities led by Indigenous peoples taking place in an urban park space within the City of Toronto, including ceremonies and the planting of traditional foods and medicines; on the ways in which the municipal government has reacted to these activities; and, on the potential for new kinds of legal relationships.

In considering these questions, this article adopts the vocabulary of comparison and contrast, which we understand to include the shared or conflicting understandings of law amongst a plurality of Indigenous and non-Indigenous traditions.<sup>7</sup> We begin the article by first setting out our perspectives as an urban Indigenous scholar and educator, and a non-Indigenous lawyer and scholar considering the meaning of the law and the role of city in relation to Indigenous processes of land restoration, ceremony, and governance in city parks. The paper then offers a case study that showcases a relationship between Indigenous peoples and municipal government concerning the planting of traditional foods and medicines and the conducting of ceremony along Toronto’s Humber River, including key events with city actors. The goal here is to identify disconnects amongst the parties and the differing interpretations of law that resulted.<sup>8</sup> The paper next details Toronto’s more recent approach to Indigenous-municipal relationship-building and governance, including the adoption of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), the establishment of an Indigenous relations office, and the training of staff on Toronto’s Indigenous history. The paper concludes by examining how the city’s recognition of Indigenous law is necessary for an Indigenous-municipal relationship centered on reconciliation, with specific recommendations.

This paper builds on existing scholarship by: first, bringing the relationships of Indigenous peoples and municipal governments into sharper focus; and, second, by exploring relationship-building beyond Canadian law’s definition and jurisdiction. In our view, there is considerable capacity for Indigenous and municipal governments to rethink their relationships in respect of urban parks in a manner that recognizes their respective histories, shared interests, and Indigenous environmental expertise and laws. Parks are a crucial site of Indigenous-municipal relationships given that they are deemed to be ‘public’ land, they are used in various ways, they are often close to water, and there is a history of innovative governance and property relationships.<sup>9</sup>

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<sup>6</sup> The term “Indigenous peoples” include all of the following: First Nations, “bands” as defined by the Indian Act, other Indigenous governments, Inuit, Métis, and other Indigenous peoples, whether members of bands or possessing status under the Indian Act or not.

<sup>7</sup> John Borrows, “Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation” (1997) 28:1 UBC Law Review 1 at 6.

<sup>8</sup> John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

<sup>9</sup> See e.g. Te Urewera Act 2014 (no. 51). Section 3 includes the following provisions: “Te Urewera is ancient and enduring, a fortress of nature, alive with history; its scenery is abundant with mystery, adventure, and remote beauty; (2) Te Urewera is a place of spiritual value, with its own mana and mauri; (3) Te Urewera has an identity in and of itself, inspiring people to commit to its care; and (9) Tūhoe and the Crown share the view that Te Urewera should have legal recognition in its own right, with the responsibilities for its care and conservation set out in the law of New Zealand. To this end, Tūhoe and the Crown have together taken a unique approach, as set out in this Act, to protecting Te Urewera in a way that reflects New Zealand’s culture and values.”

Our objective is to understand how cities can enable or impede urban Indigenous peoples to recover their relationships with land and water, with ‘place’ in the deepest possible sense. While this paper focuses on Toronto, we believe it has broader relevance to Indigenous-municipal relationships everywhere. The paper proposes that legal reinvigoration can, and indeed must, proceed in cities, which are creating and experiencing increased environmental crises.<sup>10</sup> We suggest that embracing new forms of Indigenous-municipal relationships should not be seen as a charitable act or merely as a remedy for past wrongs, but a necessary step for cities, where most people now live.

## I. A mindful methodology: Approaching the question together

This paper approaches the topic using Indigenous methodologies, and narrative and doctrinal analysis, the latter of which includes case law and legislation. Knowledge of Indigenous resurgence and renewal along a stretch of the Humber, and of the relationship between Indigenous peoples engaged in this renewal and city actors, comes directly from one of the authors.<sup>11</sup> As scholars committed to honouring Indigenous processes, we first set out our perspectives and relationships to this topic.<sup>12</sup>

Doug Anderson: *Ahnii. Ottawa Ndobinjibaa. Bungee Métis endau. Neenda nokee Owiichiwe.*<sup>13</sup> I am introducing myself as best I can in *Anishinaabemowin*, which is an original language of the place I call home, Toronto. It is a language that has until fairly recently been a part of my own heritage, although this link was extinguished around the same time my extended family left their longstanding territory in central Manitoba in the mid-20<sup>th</sup> century. While I am classified as ‘Métis’ by the government of Canada, my eldest uncle told me that this was not really our term for ourselves, and that our people and their manner of speaking were commonly known as Bungee in their time, which refers to the people of mixed Anishinaabe (Saulteaux, or Plains Ojibwe) and Scottish/ Orkney ancestry, along with a mixture of other peoples (including northern Plains and James Bay Cree, reflecting our peoples' strong relationship with the Hudson's Bay Company). My mother's family is mostly English from BC. My father's generation was the last to speak a “Creole” language unique to the “English half-breeds” over the course of several centuries during the peak of the fur trade.<sup>14</sup> In the early 1960's, my father and his brother and sister all migrated to the Ottawa area from Manitoba, seeking work. Before that, my grandparents had left the shores of lake Manitoba (Kinesota, Reedy Creek, Alonsa) when my father was young, also looking for work, although the family would return to these territories when they could. My oldest uncle moved to a rural area south of Ottawa. My father and aunt moved nearby and eight of us cousins grew up in close proximity. In typical modern Canadian

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<sup>10</sup> See Jocelyn Stacey, “Climate emergencies and the rule of law,” The Canadian Bar Association (9 April 2019), online: <https://www.nationalmagazine.ca/en-ca/articles/law/opinion/2019/climate-emergencies-and-the-rule-of-law> (last updated: 17 December 2019).

<sup>11</sup> Leanne Simpson, “Anticolonial Strategies for the Recovery and Maintenance of Indigenous Knowledge” (2004) 28:3 *The American Indian Quarterly* 373.

<sup>12</sup> Deborah McGregor, “Coming Full Circle: Indigenous Knowledge, the Environment, and Our Future” (2004) 28 *American Indian Quarterly* 385.

<sup>13</sup> *Anishinaabemowin* to English translation: “Hello, I am from Ottawa. I am Bungee Métis (Scottish Métis from Manitoba). My work is to be a helper and advisor to the leaders.”

<sup>14</sup> Jennifer S. H. Brown, “Métis, Halfbreeds, and Other Real People: Challenging Cultures and Categories” (1993) 27:1 *The History Teacher* 19-26.

fashion, my generation continued to scatter across the country seeking work, and I came to Toronto as a youth for that reason. So I have been born, raised and lived my whole life far from the territories of my own nation. But as with my father and uncle, the need to maintain a connection with land and water has stayed with me from a young age, and I have also spent my whole life in close relationship with Indigenous people of this territory as well as other Indigenous people here who, like me, are part of a traumatized diaspora.

All my life I have lived and acted in the realm where Indigenous and Canadian peoples struggle to co-exist and share the places where we live. Finding through experience that Canada is generally unable (so far) to respect, act in meaningful relation to, or even understand Indigenous perspectives, I have increasingly been compelled to find ways to support the assertion of Indigenous principles, responsibilities and rights in relation to Canadian society. I am not an Indigenous leader, but rather a kind of 'civil servant', in the sense that I look to those I consider leaders (the various resurgent Indigenous cultural authorities of Southern Ontario), and try to follow their direction, although this role is not formal and I cannot speak on anyone's behalf but my own. For this reason, I introduce myself here as *Owiichiwe*, which could be translated roughly as helper, rather than *Ogima*, which implies a leader.

Alexandra Flynn: my heritage is mixed European, although I have no connection to the lands and spaces across the ocean of my long-ago blood ancestors. Indeed, much of my biological father's history remains unknown to me. Instead, I have deep roots in the cultural and institutional bedrock of this settler nation, and whose ancestors and myself have participated and benefited from the long colonial history that saw the displacement of Indigenous peoples and their governments. All of my grandparents came to Canada escaping poverty elsewhere, living on and claiming Treaty 6 lands as farmers and grain elevator workers. My maternal grandparents moved regularly across Saskatchewan seeking new work and, later in their lives, adopted a little boy during the Sixties Scoop, who experienced considerable racism and was torn from his Indigenous heritage. I was raised by my mother, a social worker, who worked mainly in northern towns and cities including Iqaluit, Nunavut and Churchill, Manitoba. My childhood memories include time spent on the land, camping and riding skidoos, and participating in ceremony. I was and am fortunate to learn from Indigenous knowledge keepers, Elders, and from aunties and uncles. Until recently, I did not appreciate the extent to which I benefited from these teachings with little reciprocity given in return.

In my adult years, I have lived in big cities like Toronto, Vancouver and New York, escaping from tall buildings and cement with my family as often as possible. I began my career working as a lawyer representing First Nations on land management and contract matters, with band councils as clients. Now, as a scholar, I study the laws that bind and enable cities, and the governance models that local governments create. I believe that there is no talking about municipalities without a thorough acknowledgement of the Indigenous people and communities here long before Europeans and other settlers arrived, and who continue to exercise Indigenous laws. I see it as my responsibility, and also a privilege, to listen, to better understand the Indigenous communities, histories, and laws of the places I conduct research in and call home. This paper hopes to contribute to an understanding of the legal role of cities in relation to Indigenous communities by moving beyond Canadian law structures to ask the preliminary question: as Indigenous and non-Indigenous peoples, how can we live and move forward

together, with respect and reciprocity, and how can laws (Indigenous and Canadian) help to move us forward?

## II. Indigenous law and unsigned agreements in a city park

This paper focuses on a park located in Toronto.<sup>15</sup> The land where the park is located has a complex and sometimes contested history in recent centuries. The nations with a history on the site during these recent centuries include: the Michi Saagiig Nishnaabeg (Mississauga Ojibwe), including the Mississaugas of New Credit and Treaty 13; the Haudenosaunee Confederacy; and, the Wendat and Petun Nations, although the latter two were driven out or adopted into the first two nations during the period of disease and war that swept the region in the 1600’s. The Michi Saagiig Nishnaabeg explicitly claim the longest relationship with the area, at least according to well-regarded Michi Saagiig Nishnaabe Elders.<sup>16</sup> People from other Indigenous communities have been arriving and living here from diverse places for a long time, and this diversity of Indigenous people found here has increased significantly as the city has grown. The area is said by many to be subject to the Dish With One Spoon Wampum Belt Covenant, a treaty agreement between the Haudenosaunee Confederacy and the Ojibwe and allied nations to peaceably share and care for the resources around the Great Lakes. In recent times, newer, non-Indigenous people from around the world have made this place home, and called it Toronto, within a province, within a federation – another collection of layered assertions of sovereignty. Cities are crucial sites of displacement, as they were almost always Indigenous communities first, rich with access to resources and central to transportation. The displacement of Indigenous communities in cities served to further the economic objectives of non-Indigenous peoples, a fundamental and often omitted part of Toronto’s history.<sup>17</sup>

The context for Indigenous land-based cultural resurgence in Toronto is complex, and cannot be adequately described here. Briefly put, two distinct Indigenous confederacies still predominantly hold a more recent and current relationship with what is now called Toronto, these being the Anishinaabek and the Haudenosaunee (Six Nations Confederacy).<sup>18</sup> Both confederacies have longstanding and contemporary relationships with the region of southern Ontario,<sup>19</sup> although it is said that the Michi Saagiig Nishnaabeg (a part of the larger Anishinaabek nation) have had the longest relationship with the region, and that the emphasis on “Iroquoian” (Haudenosaunee)

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<sup>15</sup> The Indigenous name “Tkaronto” is increasingly being used to refer to Toronto, and according to Indigenous languages scholar Dr John Steckley, initially comes from the Mohawk name for what is commonly known as the Atherley Narrows, between Lakes Couchiching and Simcoe, where 4000 years ago a fish weir was built (Jeff Gray, “A Defining Moment for Tkaronto,” *Globe & Mail* (18 April 2018), online: <<https://www.theglobeandmail.com/news/national/a-defining-moment-for-tkaronto/article18432992>>).

Subsequently, the French mispronounced it as Toronto and then used that name for a training camp at the mouth of the Humber River (Dr. John Steckley, “What if Indigenous Languages Mattered?” TEDxHumber College (February 19, 2012), online: <<https://www.youtube.com/watch?v=Q50ZJWc1uyE>>).

<sup>16</sup> Gidigaa Migizi (Doug Williams), *Michi Saagiig Nishnaabeg: This is Our Territory* (ARP Books: Winnipeg, 2018)

<sup>17</sup> Coulthard, *supra* note 4.

<sup>18</sup> Heather Dorries, *Rejecting the “False Choice”: Foregrounding Indigenous Sovereignty in Planning Theory and Practice* (Unpublished PhD Thesis, Department of Geography, University of Toronto, Toronto, 2012).

<sup>19</sup> Victoria Jane Freeman, *Toronto Has No History! Indigeneity, Settler Colonialism and Historical Memory in Canada’s Largest City* (University of Toronto: Unpublished Dissertation, 2010).

peoples arises from an early European bias.<sup>20</sup> Various covenants and treaties have been in place in the area, from times long preceding the arrival of Europeans to agreements involving the most recent people residing there, the Michi Saagiig Nishnaabeg.<sup>21</sup> An Elder who lived near the river featured in this article had a Mohawk<sup>22</sup> mother and an Anishinaabe father who was born and raised in Toronto in the early 1900s, in a community of Michi Saagiig Nishnaabeg who had never left Toronto, and who simply continued to reside there as the city had grown around them.<sup>23</sup> There are also many other Indigenous people who have been here and left or been absorbed into the above nations (most notably the Wendat and Petun),<sup>24</sup> or who have landed here from other places across the Americas, from the Arctic to Argentina and Chile.

The City of Toronto has one of the highest Indigenous populations amongst Canadian cities, estimated at 70,000, although many researchers believe that the actual number is much higher.<sup>25</sup> Based on a City of Toronto study, 67.1% of Indigenous peoples in the city were North American Indians, 26.8% Métis, and 14% Inuit.<sup>26</sup> As with most other Canadian cities, this population is rising, with urban Indigenous peoples constituting the fastest growing segment of society.<sup>27</sup> At one time, it was assumed that Indigenous peoples living in cities were just passing through – either pursuing temporary work or fleeing problems on reserves, which were their ‘real’ homes. However, for many urban Indigenous people, the city is their home. Urban Indigenous peoples living in cities share a history with their families and friends living on reserves, including a commitment to the land, but their daily realities, identities, and experiences are distinctly urban.

For some time, Indigenous people in Toronto have been recovering and practicing their cultural traditions,<sup>28</sup> and some never stopped, even when they were banned under Canadian law. Urban Indigenous agencies formally incorporated under Canadian law have been finding officially

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<sup>20</sup> Gidigaa Migizi, *supra* note 16.

<sup>21</sup> *Ibid.* See e.g. Great Law of Peace, Pre-contact Anishinaabe Inokinogewin, Dish With One Spoon Covenant, Kuswenta (Two-Row) Belt, Nanfan Treaty of 1701, Royal Proclamation of 1763, 1764 24-Nation Belt, Treaty 13, and the ‘Toronto Purchase’.

<sup>22</sup> The Mohawks are one of the nations in the Haudenosaunee Confederacy.

<sup>23</sup> Personal Communication, Jay Mason, Mohawk/Michi Saagiig (2015-16).

<sup>24</sup> Personal communication, Seth Laforte, Mohawk (2016). See also Gidigaa Migizi, *supra* note 16.

<sup>25</sup> The City of Toronto’s 1999 City Task Force on Community Access and Equity estimated Toronto’s Aboriginal community between 65,000 and 100,000 with the majority in the downtown core (City Council, “Development of an Urban Aboriginal Strategy for Toronto,” City of Toronto (August 5, 2009).

<sup>26</sup> City Council, “Statistics and Baseline Data – Aboriginal Persons Demographic,” City of Toronto (September 30, 2009).

<sup>27</sup> Indigenous and Northern Affairs Canada. *Urban aboriginal peoples* (2014), online: <<https://www.aadnc-aandc.gc.ca/eng/1100100014265/1369225120949>>.

<sup>28</sup> The information in this section was drawn from one of the authors based on observations and conversations, beginning as a young person living in Toronto, watching cultural phenomena unfold in locations like gymnasiums after a hundred years more or less in hiding. Margaret Kovach notes that Indigenous methodologies are “fluid, non-linear and relational” (Margaret Kovach, “Emerging from the margins: Indigenous methodologies” in Brown, L. and Strega S., eds., *Research as Resistance* (Toronto: Canadian Scholars Press, 2005). See also Camilla Brattland, Britt Kramvig and Helen Verran, “Doing Indigenous Methodologies: Toward a Practice of the “Careful Partial Participant” (2018) 2:1 *ab-Original* 74-96; Lynn Lavallée, “Practical Application of an Indigenous Research Framework and Two Qualitative Indigenous Research Methods: Sharing Circles and Anishnaabe Symbol-Based Reflection” (2009) 8:1 *International Journal of Qualitative Methods* 21-40. Interviews with City of Toronto officials were obtained further to university ethics approvals.

approved ways to hold ceremonies in the city, in and around buildings, land and water.<sup>29</sup> To do this requires significant bureaucratic challenges that are not possible for most people to meet.<sup>30</sup> Furthermore, while these agency-based ceremonial sites are vital to the community, Indigenous people may not always find it convenient or appropriate to make use of them, for a variety of reasons.<sup>31</sup> Many people living in Toronto cannot easily leave the city, and so people also independently find ways to restore their relationships with the urban spaces where they live, in ways that are not defined under Canadian legal frameworks or municipal bylaws.<sup>32</sup> For example, some people have lit ceremonial fires on the beaches of Lake Ontario and elsewhere across the city, or planted medicines and food.<sup>33</sup> When challenged by city workers, Indigenous people have stood their ground, and so far municipal authorities tend to stand aside, unsure of how to respond.<sup>34</sup> Indigenous placenta burial ceremony has taken place in quiet corners of parks (many urban Indigenous and other people keep their children's placentae in the freezer for years and even decades, having limited to no ability to return to their original territories).<sup>35</sup> Diverse other ceremonies and even ceremonial structures have been raised and used at various neglected sites, most notably along Toronto's Rouge and Humber rivers, and more are beginning to appear.<sup>36</sup> In addition to ceremonial activities, traditional harvesting activities have also been taking place, including fishing, medicine gathering, traditional agriculture and much more.

In 2013, along the Humber River which runs through Toronto's west side, Indigenous peoples began what was initially perceived by City officials as a kind of eco-restoration project, with significant implications for Indigenous-municipal relationships and agreements. The sites in question, about 50 acres in total, are overrun with invasive plants and littered with garbage and have been mostly neglected for over 60 years. The main users seem to be sporadic hikers and dog walkers. People of diverse backgrounds also fish there. Sometimes people sleep there, some have built small structures, and parts along the river and in the forest have long been sites for bonfires and parties. There is a cat cemetery, and one Korean-Canadian family quietly farmed a large area near the river for decades, building a shrine, palisades, and a well,<sup>37</sup> until authorities finally noticed them and tore it all down. Quite a few Indigenous people live in the area, and have done so continuously since long before Toronto became a colonial city in 1834, albeit in traumatized and marginalized ways in recent times.<sup>38</sup>

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<sup>29</sup> *Ibid.* This particular knowledge comes from talking with various people over the years, knowing the history of how urban Indigenous agencies have put ceremonial lodges and fires on their sites.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.* See also Alex McKeen, "Indigenous activists call Queen's Park ceremonies a 'birthright'," Toronto Star (9 June 2019), online: <<https://www.thestar.com/news/gta/2017/06/09/indigenous-activists-call-queens-park-ceremonies-a-birthright.html>>.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Jake Schabas, "Secret garden at Eglinton Flats," Spacing Toronto (24 July 2009), online: <<http://spacing.ca/toronto/2009/07/24/secret-garden-at-eglinton-flats/>>; Spacing Magazine, "Secret garden at Eglinton Flats," Flickr, online: <<https://www.flickr.com/photos/spacing/sets/72157621682856403/>> (last updated: 17 December 2019).

<sup>38</sup> See note 29.



This article cannot claim to represent the City of Toronto’s perspective, but based on conversations and correspondence, what was happening in the “eco-restoration project” was fairly straightforward for the city: a community group was applying to plant some Indigenous plants on property officially managed by the City’s Parks, Forestry and Recreation (PFR) Division and owned by the Toronto and Region Conservation Authority (TRCA) (“managed” and “owned” refer here to Canadian legal frameworks and agreements, and do not reflect Indigenous understanding or perspectives).<sup>39</sup> Under the city’s requirements, a certain type of agreement and understanding would need to be made that acknowledged the authority and responsibility of the city and TRCA, protected them in relation to liability concerns, and ensured quality of the overall project in relation to certain standards held for eco-restoration projects (approved plant lists, adherence to bylaws regarding everything from cutting trees to types of tools permitted and a list of other requirements).

All of these municipal requirements make sense in their own narrow municipal context. However, Indigenous people who have a relationship with the area are living out this relationship in ways that municipal officials are simply not equipped to manage or address. This inability goes beyond the actions and omissions of individual city officials and reflects a general lack of awareness of what is at stake for Indigenous people engaged in diverse activities along the Humber. Indigenous people involved in the area do not see their recently increased engagement in this area as an environmental activity or project so much as a way to renew and strengthen their relationships with and responsibilities for the land and water and all the layers of being surrounding it. Indigenous engagement in the area transcends any Canadian conception of asserted jurisdiction.<sup>40</sup> At the same time, the city government has policies in relation to parks and their management that contradict Indigenous understanding, suggesting a profound schism in understanding was inherent in the project from the beginning.<sup>41</sup>

After approaching the city about planting on the site (certain funds supporting the purchase of Indigenous plants – meaning plants that have their origins in the geographic region and were known and used by Indigenous peoples - required approval from the city), it quickly became apparent that the process of working formally on the site was an onerous one, especially for grassroots people unaffiliated with any agency. Several events and experiences substantiate the procedural and relationship challenges. Unpaid grassroots community members sat in several meetings with city and TRCA officials over a period of many months, and various letters and numerous e-mails were also exchanged, with “approval” coming late in the season (so that planting could not commence until July, when the risks to the plants’ survival were much higher). The Indigenous people involved had never considered themselves as needing the city’s approval, but did see the value in establishing a positive relationship, not to mention being able to access certain funds that could support the planting activities.<sup>42</sup>

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<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.* As it turns out, many of the Indigenous people involved came to feel that they would have been better off without the money and the conditions attached to it, framed as it all was by perspectives that could not even begin to appreciate an Indigenous understanding of relationship to place.

When the project began Anishinaabe and Haudenosaunee elders conducted ceremonies involving fire. People involved were very conscious of the many ancestors who had been present on the site over many generations (of course it is known that many Indigenous people have always been present there, and there is even physical evidence of their presence in the ways the older trees in the forest have been marked). One Haudenosaunee advisor who conducted a prayer ceremony on the site in 2013 had also been involved in the identification of Haudenosaunee peoples’ remains and cultural artifacts at an archaeological site (a large Seneca<sup>43</sup> village) downstream.<sup>44</sup>

After the first year, local Indigenous people informed the city of their desire to celebrate the work with a ceremonial fire.<sup>45</sup> City officials advised that a formal request be submitted, which was done as a courtesy, and this request was rejected.<sup>46</sup> At around the same time, city officials could see that the Indigenous people involved were serious about working on the land, since hundreds of plants had been installed over several large areas (although city officials involved apparently remained unaware of the deeper nature of the relationship with the site). The city offered to develop a more formalized agreement similar to others that had been signed with various citizens’ groups over the years. Up to that time, the work had been done on the basis of a letter of approval from the city.<sup>47</sup> The agreement offered by the city raised concerns with the network of Indigenous people involved because it failed to consider the unique nature of their relationship with the site.<sup>48</sup> After consulting with a young Indigenous legal student, it was decided to submit a version of the agreement that referenced the temporary and evolving nature of the agreement, and the importance of the principles outlined in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and the Ontario Human Rights Code.<sup>49</sup> The city never responded formally to this version. The work continued for some years without a formal agreement, on the basis of communications regarding plant lists.

At around the same time (after the first year of intensive planting), various Indigenous Elders and community members (and one in particular who is from the territory under the Williams Treaty) made it clear that ceremonies and fires did not require any formal approval from the City – as long as high Indigenous standards for safe fires lit for ceremony were maintained.<sup>50</sup> Various people from diverse Indigenous grassroots contexts (often not even in communication with one another) began to increasingly use the “eco-restoration” sites in different ways (and local Indigenous people had already been using the sites in some of these ways already). For example: women have been holding regular full moon ceremonies near the water; three purification lodges

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<sup>43</sup> The Seneca are one of the original nations in the Haudenosaunee Confederacy.

<sup>44</sup> Personal Communication with Haudenosaunee Advisor William Woodsworth (2013), a Mohawk architect involved in the process of advising on the remains found at the Teiaigon Seneca village site.

<sup>45</sup> See note 29.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.* For example, in addition to ceremonial protocols not detailed here, people were advised to ensure the fires were not too large, that they were not a place for drug or alcohol consumption, that the fire pits be lined with fireproof materials, that certain kinds of wood that send out many sparks not be used, that there should always be a responsible fire keeper present who remains with the fire until it has been thoroughly extinguished, and so on. In general, Indigenous standards for fires meet or exceed the requirements of City officials. It is notable that other, unrelated fires lit by local non-Indigenous people regularly take place in the vicinity that break all these requirements.

were built over a number of years and used numerous times; various other ceremonies such as naming ceremonies, placenta burial, storytelling and diverse other activities have been held there; the ethical and sustainable harvesting and processing of plants, fish and animals has been taking place; a 24 foot teaching lodge<sup>51</sup> was erected; and many ceremonial fires have been lit for diverse purposes, some lasting all night.<sup>52</sup> This urban Indigenous cultural resurgence is directly related to the progress made in bringing parts of the area back in the direction of holistic ecological balance. The area has been inoculated with hundreds of plants holding cultural significance for Indigenous peoples, and various Indigenous Elders and cultural knowledge keepers have been visiting the area and advising in various ways. Unlike typical Canadian tree-planting exercises, a large area is being holistically reinvigorated on the basis of Indigenous cultural existence and responsibilities, rather than any typical Canadian sense of "environmental stewardship."

After several years without a written agreement, the city government again offered several options for agreements, but essential issues remained. For example, at one point a municipal business services official offered an agreement defining the network of Indigenous people involved as "tenants," which no Indigenous people in that network would consider signing. Later, a Parks Access Agreement was suggested, but this referenced mandatory bylaws prohibiting not only fires, but also everything from the movement of stones and dirt to swearing on the property.<sup>53</sup> So, as the years went by, Indigenous ceremonies continued with some awareness on the part of city officials but no formal approval. Finally, in 2019, a Municipal Licensing and Standards (MLS) officer took down the Teaching Lodge, being unaware of the vague, unspoken "don't ask don't tell" understanding between parts of the city bureaucracy and the Indigenous people involved. The City was directly challenged by community members to respond to their concerns about this action. Surprisingly (for Indigenous people involved, and with support from the city's Indigenous Affairs Office), city officials offered an apology at a meeting and three MLS staff came to help rebuild the lodge with community members. Nevertheless, official obstacles remain to arriving at any formal agreement in the foreseeable future; for one thing, insurance concerns for the city cannot simply be ignored, from the city's point of view, and yet there is currently no clear legal mechanism for absolving the city of any potential liabilities that could arise - although addressing this concern over time seems more like a matter of a legal mechanism serving as a kind of an exemption.

More significantly (and this is ultimately what prevents specific exemptions like the one suggested above), city officials are not equipped to institutionally acknowledge the longstanding covenants and laws that apply to this area of the Humber, or to build in holistic responsibilities for things like the wellbeing of future generations (a kind of "liability" that far exceeds anything that might arise from the mere accidental injury of one or another litigious individual).<sup>54</sup> Addressing these obstacles to any agreement challenges the strict contours of Canadian law and Toronto's limited understanding of Indigenous law, as discussed next.

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<sup>51</sup> This lodge was not a permanent structure, and was built of bent saplings and jute twine.

<sup>52</sup> *Ibid.*

<sup>53</sup> City of Toronto, "Parks," Toronto Municipal Code Chapter 608, online: <[https://www.toronto.ca/legdocs/municode/1184\\_608.pdf](https://www.toronto.ca/legdocs/municode/1184_608.pdf)>.

<sup>54</sup> Freeman, *supra* note 20.

### III. Municipalities and the duty to consult and accommodate

Indigenous peoples have long challenged the embedded ideals and technicalities of Canadian law to assert their rights, through legal actions and otherwise.<sup>55</sup> In terms of judicial achievements, the affirmation that the Crown owes a duty to consult and accommodate Indigenous communities under section 35(1) of the *Constitution Act* was a major legal achievement.<sup>56</sup> The duty means that federal and provincial governments, as the Crown, can neither ignore assertions of Aboriginal rights and title, nor refrain from proactively engaging with Indigenous peoples when contemplating action that may infringe on their rights. There remain many critiques of the limitations and concerns with the duty to consult as a conceptual and legal tool to address Indigenous rights, including its incompatibility with the principles of reconciliation.<sup>57</sup>

Arguments based on the duty to consult and accommodate have not been raised, at least not to date, for protection of the planting and ceremonial activities along the Humber. There has been no decision of the city to prohibit planting and ceremonies and, if there were, duty to consult and accommodation arguments would invoke questions of ongoing occupation and use by a specific Indigenous community and assertions of harm resulting from a prohibition from planting and conducting ceremony, as well as procedural requirements related to the duty.<sup>58</sup> However, even if the duty hasn't been raised in its discussions with the city, the duty to consult has been a focal point for understanding Indigenous-Crown relationships, so understanding its application to municipal governments helps in the conceptualization of a new way of looking at Indigenous-municipal relationships. It helps us to ask whether there is capacity within Canadian law to have respectful, reciprocal relationships.

#### *The duty to consult and accommodate*

In Canada, ‘reconciliation’ is one of the fundamental purposes of protecting Aboriginal rights.<sup>59</sup> Consultation and accommodation are mechanisms that are used to work toward reconciliation.<sup>60</sup> Aboriginal and treaty rights of First Nations are recognized and affirmed under section 35(1) of the Constitution and have been given additional context through the courts.<sup>61</sup> The Supreme Court

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<sup>55</sup> Taiaiake Alfred, *Peace, Power, Righteousness* (Toronto: University of Toronto Press, 1999); Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Peterborough, ON: Broadview Press, 2005).

<sup>56</sup> *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

<sup>57</sup> See e.g. Lorne Sossin, “The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights” (2010) 23 *Canadian Journal of Administrative Law & Practice* 93; Jacob Damstra, “Heroic or Hypocritical: Corporate Social Responsibility, Aboriginal Consultation, and Canada's Extractive Industries Strategy” (2015) 25 *Transnat'l L. & Contemp. Probs.* 153; Karen Drake, “The Trials and Tribulations of Ontario's Mining Act The Duty to Consult and Anishinaabek Law” (2015) 11 *McGill Int'l J. Sust. Dev. L. & Pol'y* 183; Chris W. Sanderson, QC, Keith B. Bergner, & Michelle S. Jones, “The Crown's Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose, and Limits of the Duty” (2012) 49:4 *Alta. L. Rev.* 821; Mariana Valverde, “The Honour of the Crown is at Stake: Aboriginal Land Claims Litigation and the Epistemology of Sovereignty” (2011) 1:3 *UC Irvine Law Review* 955; Lindsay Galbraith, “Making space for reconciliation in the planning system” (2014) 15:4 *Planning Theory & Practice* 453.

<sup>58</sup> *Mikisew Cree First Nation v. Canada* (Governor General in Council), 2018 SCC40, [2018] 2 S.C.R. 765.

<sup>59</sup> *R v. Van der Peet*, [1996] 2 S.C.R. 507.

<sup>60</sup> Lindsay Galbraith, “Making space for reconciliation in the planning system” (2014) 15:4 *Planning Theory & Practice* 453.

<sup>61</sup> *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.

of Canada has ruled that the Crown must act ‘honourably’ toward First Nations. This means, in particular, that the Crown must consult and accommodate if land or other rights will be affected. This obligation is exclusively held by federal and provincial governments, although certain procedural obligations may be delegated to ‘third parties’.<sup>62</sup> The court has adopted a spectrum analysis to assess the degree of consultation owed. One spectrum examines the rights that the Indigenous community has in respect of the land, which includes its history and continual occupation; a second spectrum examines the effect that a proposed government action would have on the Indigenous community in question.<sup>63</sup> While the constitution recognizes and affirms Aboriginal rights, many scholars and activists have noted that barriers to meaningful exercise of those rights present one of the most pressing access to justice issues of our time.<sup>64</sup>

Under section 92 of the *Constitution Act*, provincial governments are responsible for municipal institutions and matters of a local or private nature, which includes the development of planning policies. Until recently, the Province of Ontario did not provide any requirement that municipalities undertake Aboriginal consultation prior to making planning decisions. In 2014, the Province of Ontario released an updated version of the Provincial Policy Statement (PPS), which addresses its land-use planning policies and decision-making abilities. It has two relevant sections: section 4.3 states “This Provincial Policy Statement shall be implemented in a manner that is consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*.” Section 2.6.5 more specifically addresses heritage by stating: “Planning authorities shall consider the interests of Aboriginal communities in conserving cultural heritage and archaeological resources.” These policy statements are not enshrined in provincial legislation setting out municipal powers and responsibilities and have had limited traction when raised at quasi-judicial planning bodies.<sup>65</sup>

### ***Municipalities as a Crown?***

To date, provincial courts and quasi-judicial tribunals have consistently argued that a municipality has no independent constitutional duty to consult First Nations whose treaty and other interests may be affected by municipal decision-making. In *Neskonlith Indian Band v. Salmon Arm (City)*, the Neskonlith were unsuccessful in their appeal to the British Columbia Supreme Court regarding a permit for development issued in a flood plain beside their reserve.<sup>66</sup> The appellants argued that the duty to consult Aboriginal communities is a legally binding covenant because municipalities can negatively affect Aboriginal rights or interests. The respondents, who succeeded in the appeal, stated that the honour of the Crown was non-delegable, so the duty remained entirely with the Crown. The court agreed that municipalities do

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<sup>62</sup> *Clyde River (Hamlet) v. Petroleum Geoservices Inc.* 2017 SCC 40 (CanLII) and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.* 2017 SCC 41 (CanLII).

<sup>63</sup> Haida, *supra* note 62.

<sup>64</sup> Fraser McLeod, Leela Viswanathan, Graham S. Whitelaw, Jared Macbeth, Carolyn King, Daniel D. McCarthy and Erin Alexiuk, “Finding Common Ground: A Critical Review of Land Use and Resource Management Policies in Ontario, Canada and their Intersection with First Nations” (2015) *International Indigenous Policy Journal* 1; Clara Fraser and Leela Viswanathan, “The Crown Duty to Consult and Ontario Municipal-First Nations Relations: Lessons Learned from the Red Hill Valley Parkway Project” (2013) 22:1 *Canadian Journal of Urban Research*.

<sup>65</sup> See e.g. *Cardinal v. Windmill Green Fund LPV*, 2016 ONSC 3456 (consultation of Indigenous peoples may be adequate if regular community consultations include Indigenous participants).

<sup>66</sup> *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379.

not have the resources or mandate to have an obligation imposed upon them to consult potentially affected Aboriginal communities.

Kaitlin Ritchie argued that, were municipalities to take on that duty, it would water down the nation-to-nation relationship, undermining the treaty and other relationships established between the Crown and Indigenous nations.<sup>67</sup> Janna Promislow endorsed the rationale given by the courts that municipalities should not have a duty to consult, because their decisions would not be considered final (given provincial oversight in municipal decision-making), so there can be no effective remedy for First Nations.<sup>68</sup> This, she argues, leads to too much division in the decision-making process, which would ultimately impair the ability to meet reconciliation objectives. In contrast, Shin Imai and Ashley Stacey took issue with the question of whether there is a municipal duty to consult, arguing that it creates a precedent by implying that some bodies do not have any obligation for constitutional burdens, and therefore may ignore any restrictions that could be imposed upon them.<sup>69</sup> They suggest that the *Haida* decision was never meant to mean that only the Crown has the right to consult and accommodate Aboriginal peoples; rather, it meant that everyone must adhere to the principles of consultation and accommodation. Felix Hoehn and Michael Stevens argue that, given the evolution of municipal autonomy, and as a result of recent Supreme Court of Canada jurisprudence regarding the duties of third parties acting as an arm of the Crown,<sup>70</sup> municipalities do in fact hold the duty to consult and accommodate.<sup>71</sup> In short, there remains ample confusion and debate on the proper role of municipalities in the context of consultation.

While municipalities may or may not have a duty to consult and accommodate as a Crown, provinces can delegate the procedural obligation to consult with Indigenous communities, while retaining the ultimate responsibility to ensure that the duty has been properly exercised. Even where provinces have not formally delegated the duty to consult to municipalities, like in Ontario, there remain many examples of partnerships, agreements and relationship-building amongst Indigenous and municipal governments.<sup>72</sup> For example, Christopher Alcantara and Jen Nelles have provided some examples of the many hundreds of municipalities that already engage in consultations that affect Aboriginal communities and their interests.<sup>73</sup> While the authors did not specifically explore the meaning of consultation or the duty to consult more broadly, they found that Indigenous–municipal agreements are created *largely without the guidance or resources of federal or provincial governments*. It appears that a sense of “honour” and “duty” can certainly be demonstrated on the part of municipalities in some ways (however limited)

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<sup>67</sup> Kaitlin Ritchie, “Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening The Goals of Reconciliation and Meaningful Consultation.” (2013) 46.2 UBC Law Review, 397-438.

<sup>68</sup> Janna Promislow, “Irreconcilable? The Duty to Consult and Administrative Decision Makers” (2013) 22:1 Constitutional Forum 63.

<sup>69</sup> Shin Imai and Ashley Stacey. “Municipalities and the Duty to Consult Aboriginal Peoples: A Case Comment on *Neskonlith Indian Band v. Salmon Arm (City)* (2014) 47.1 UBC Law Review 293-312.

<sup>70</sup> *Clyde River (Hamlet) v. Petroleum Geoservices Inc.* 2017 SCC 40 (CanLII) and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.* 2017 SCC 41 (CanLII).

<sup>71</sup> Hoehn and Stevens, *supra* note 3.

<sup>72</sup> Clara Fraser and Leela Viswanathan, “The Crown Duty to Consult and Ontario Municipal-First Nations Relations: Lessons Learned from the Red Hill Valley Parkway Project” (2013) 22:1 Canadian Journal of Urban Research.

<sup>73</sup> Christopher Alcantara and Jen Nelles, *A Quiet Evolution: The Emergence of Indigenous-Local Intergovernmental Partnerships in Canada* (Toronto: University of Toronto Press, 2016).

without coercion or formal recourse to courts. There is also legal scholarship that explores the agreements between First Nations and Crown governments, including co-management agreements over shared resources.<sup>74</sup> First Nations and municipalities have signed numerous agreements including relationship building protocols, joint land use plans, and community economic development plans.<sup>75</sup> While conflicts inevitably arise, simple goodwill and common sense among neighbours is also clearly possible. This is where the greatest promise lies, as we will see below.

### *Initial steps of Indigenous-municipal relationship-building in the City of Toronto*

First Nations and municipalities have long been forming relationships and agreements with varying degrees of legal formality.<sup>76</sup> Municipal boundaries often conflict with Indigenous lands, including reserves and traditional territory, and with First Nations caught between the decisions of multiple municipal governments.<sup>77</sup> Since this paper focuses on a park within Toronto, this section broadly outlines the specific measures taken by the City of Toronto municipal government. Over the last ten years, the City of Toronto has introduced a number of measures to include Indigenous perspectives in its governance model and to start building relationships with Indigenous communities. The efforts began slowly. Toronto's Indigenous leaders, particularly those serving on the Indigenous affairs committee, have been instrumental in achieving change. For example, the securing of a unanimous vote by City Council for a monument on Nathan Philips Square happened because a member of the Indigenous Affairs Committee was "...asking for updates and saying, 'I want it to be reported back at the next meeting what they've done.'" According to a city councillor, "That's a good strategy around here, because... when something's happening off the side of someone's desk it just tends to take forever."<sup>78</sup> These Indigenous leaders are disproportionately tasked with leading Toronto's strategies and efforts. As the councillor noted, "What we don't want to do is just keep going to those individuals and making their lives miserable, because it's a lot of work."<sup>79</sup>

In 2008, Toronto struck an Aboriginal Affairs Committee comprised of up to 28 service provider organizations and one member of City Council. Reporting through the Executive Committee to City Council, the Aboriginal Affairs Committee's mandate is: to provide advice to City Council on the elimination of barriers faced by Indigenous people in the city; to liaise with external bodies on barriers to participation in public life and to the achievement of social, cultural, economic and spiritual well-being of Indigenous people; and, to address specific issues faced by the Aboriginal community, develop options for council's consideration and make recommendations.<sup>80</sup> In 2009, the City began to develop an Urban Aboriginal Strategy, which concluded the following year.<sup>81</sup> In this strategy, the city affirmed recognition and respect for the

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<sup>74</sup> See e.g. Deborah Curran, "Legalizing" the Great Bear Rainforest Agreements: Colonial Adaptations Toward Reconciliation and Conservation" (2017) 62:3 McGill LJ 813. Please note the significant research that challenges the reciprocal nature of co-management agreements.

<sup>75</sup> Alcantara and Nelles, *supra* note 74.

<sup>76</sup> *Ibid.*

<sup>77</sup> Coulthard, *supra* note 4.

<sup>78</sup> Personal interview with city councillor (July 12, 2019).

<sup>79</sup> *Ibid.*

<sup>80</sup> Executive Committee, "Terms of Reference – Aboriginal Affairs Committee," City of Toronto (May 26, 2008).

<sup>81</sup> City Council, "Development of an Urban Aboriginal Strategy for Toronto," City of Toronto (August 05, 2009).

unique status of and cultural diversity among Aboriginal communities of Toronto, including recognition of their inherent rights under the Constitution.<sup>82</sup> It also committed to supporting Aboriginal rights to self-determination by working inclusively with Aboriginal communities in Toronto to "achieve equitable outcomes."<sup>83</sup>

Following consultations with Indigenous communities, the City of Toronto introduced several policy measures, including a statement of commitment, recognizing that many Indigenous people living in Toronto are affected by historical and contemporary injustices that continue to have profound impacts on most, if not all, aspects of life, and acknowledging the contributions of Indigenous people to the success and vitality of the City.<sup>84</sup> City Council also agreed to provide a "strategic platform for proactive intergovernmental relations" on Urban Aboriginal issues, respond when issues related to urban Aboriginal people arise, and ensure that Indigenous perspectives formed part of departmental policy, planning and service delivery through the Toronto Public Service. The City identified measures to specifically address seven distinct goals/commitments to be fulfilled in relation to Indigenous peoples, including employment, economic development, housing, health, and education.<sup>85</sup>

The Truth and Reconciliation Commission (TRC) Report was released in 2015. Other actions were spearheaded around this time at Toronto City Hall. In 2014, City Council proclaimed the Year of Truth and Reconciliation in the City of Toronto. Council adopted an ongoing ceremony at City Council meetings, the establishment of an Aboriginal Affairs Office,<sup>86</sup> and a public campaign to educate residents.<sup>87</sup> The following year, City Council endorsed the 94 Calls to Action from the TRC report and requested development of concrete actions to fully implement the calls to action that explicitly recognize the role of municipal government.<sup>88</sup> These measures included: the adoption of cultural competency training for the Toronto civil service;<sup>89</sup> a 10-year capital project to incorporate Indigenous place-making in Toronto's parks;<sup>90</sup> and, a roadmap and

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<sup>82</sup> City Council, "Draft City of Toronto Statement of Commitment to Aboriginal Communities in Toronto: Building Strong Relationships, Achieving Equitable Outcomes," City of Toronto (May 27, 2010).

<sup>83</sup> *Ibid.*

<sup>84</sup> City Council, "Statement of Commitment to Aboriginal Communities in Toronto – Towards a Framework for Urban Aboriginal Relations in Toronto," City of Toronto (May 27, 2010).

<sup>85</sup> City Council, "Draft City of Toronto Statement of Commitment to Aboriginal Communities in Toronto: Building Strong Relationships, Achieving Equitable Outcomes," City of Toronto (May 27, 2010).

<sup>86</sup> City Council, "Aboriginal Year of Truth and Reconciliation and Establishment of Aboriginal Office," City of Toronto (March 19, 2014).

<sup>87</sup> *Ibid.*

<sup>88</sup> See e.g. City Manager, "Fulfilling Calls to Action from Truth and Reconciliation Commission Report," City of Toronto (April 1, 2016), available online: <<https://www.toronto.ca/legdocs/mmis/2016/ex/bgrd/backgroundfile-91816.pdf>> [hereinafter "Fulfilling Calls"].

<sup>89</sup> City Council, "Implementing Indigenous Cultural Competency Training in the Toronto Public Service," City of Toronto (May 24, 2017), available online: <<https://www.toronto.ca/legdocs/mmis/2017/mm/bgrd/backgroundfile-103955.pdf>>.

<sup>90</sup> Gilbert Ngabo, "Toronto Parks to Reflect Indigenous History," Toronto Star (13 November 2017), online: <<https://www.thestar.com/news/gta/2017/11/13/toronto-parks-to-reflect-indigenous-history.html>>. See also City staff, "Our Common Grounds: Incorporating Indigenous Place-Making in Toronto's Parks and Public Realm," City of Toronto (3 November 2017), online: <<https://www.toronto.ca/legdocs/mmis/2017/aa/bgrd/backgroundfile-108701.pdf>>.



report card regarding the implementation of plaques to commemorate Indigenous places.<sup>91</sup> In addition, City Council adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2013.<sup>92</sup> Following the release of the TRC report, the City acknowledged article 11 of UNDRIP through the work of Heritage Preservation and many other divisions that do environmental assessments requiring consultation with Indigenous peoples of the area, as part of the “City staff’s legal duty to consult.”<sup>93</sup> Toronto City Council was one of the first governments – local, provincial or federal – to adopt UNDRIP.<sup>94</sup>

These policies serve as a backdrop to the agreements (or lack thereof) with Indigenous peoples along the Humber River. In some ways, the City of Toronto can be considered a leader in its engagements with Indigenous peoples and communities - for example, by having an advisory committee and, especially, by adopting UNDRIP long before the federal or provincial governments had done so.<sup>95</sup> At the same time, the city’s decisions happened without a larger vision of the relationship and include little financial commitment.<sup>96</sup> As one city councillor stated regarding why particular policies were passed by City Council, “[W]e don’t need new money [to introduce Indigenous staffing], it’s there. Someone in parks is doing Indigenous work, so [use] them. They can keep doing Indigenous works in parks, but they’re doing it out of an Indigenous office now. And we have a coordinator position already, just bump them up. There’s someone in the police that’s already [there]... like, just take those existing resources and pool them together.”<sup>97</sup> So long as the measures asked of City Council don’t involve significant resources or challenge the city’s other obligations, including insurance, they may not be considered too controversial.<sup>98</sup>

City officials are engaging in these activities not because they see themselves as having a duty to consult *per se*, but because “there is a sense of duty that we have got to do something.”<sup>99</sup> That something relates to service provision. As one city actor stated, “we all know instinctively that the Indigenous population of Toronto has higher representation in groups that are struggling and people that need support. And who better to deliver services to those individuals than the indigenous community? Why would we line ourselves up for failure by not including them in the decision-making about how to run those services?”<sup>100</sup> Significantly, the city has not to date focused on land ownership and governance, for example by transferring lands to Indigenous communities, or forming agreements with corresponding funding to manage spaces like parks.<sup>101</sup>

#### IV. Law and Relationship-Building

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<sup>91</sup> Aboriginal Affairs Committee, “Telling Toronto’s Stories: Strengthening the Indigenous Voice,” City of Toronto (3 November 2017), online: <<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017.AA12.4>>.

<sup>92</sup> Fulfilling Calls, *supra* note 89 at 4.

<sup>93</sup> *Ibid.*

<sup>94</sup> At the time of writing, only the Province of British Columbia had passed an UNDRIP-related legislation (See Bill 41, 2019 Declaration on the Rights of Indigenous Peoples Act, online: <<https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/4th-session/bills/first-reading/gov41-1>>).

<sup>95</sup> *Ibid.*

<sup>96</sup> Personal interview, *supra* note 79.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

Urban Indigenous peoples do not fit neatly in any of the official Canadian boxes when it comes to recognized Indigenous rights. The particular challenges for urban Indigenous populations include political agency and representation, despite high populations and numerous Indigenous service providers (mostly social service and arts and cultural agencies).<sup>102</sup> Therefore, we must find legal solutions that broaden the usual conversations. We wonder here whether the legal gaps provide an opportunity for finding a vocabulary where ideas like ‘rights’, ‘title’, ‘honour’ and so on can recover their original, inherent meanings in relation to higher levels of understanding, transcending and containing both Indigenous and Canadian perspectives. We wonder if shared understandings could then lead to the development of a formal agreement, one that is able to absorb and reflect the holistic and rapidly shifting context.

### ***Why terminology matters***

Building on existing strengths and positive developments is the best place to start. Good will and a sense of wanting to do what is right are more helpful than the assertion of various conflicting legal concepts and strategies. For this reason, it may be helpful to begin with the idea of the now loaded and problematic term, ‘reconciliation’. This term was not legally defined and, therefore, had the potential to avoid the limiting legal terminology of courts and tribunals, case law, legislation, regulation and policy; indeed, when the broader principles that lie at the heart of reconciliation arises in more formal settings, plain and heartfelt language seems to rise through (or in spite of) all the technical language and considerations of the law, in ways that reflect what might be called the *spirit* of the law.<sup>103</sup> The broader notion of a fluidity in the idea of coming together means, potentially, transcending Indigenous and non-Indigenous divisions and conflicting interpretations, and informing (and perhaps transforming) the conversation from above or from within. Retired Justice and Senator Murray Sinclair has said, “Reconciliation turns on one very simple concept: I want to be your friend and I want you to be mine.”<sup>104</sup> However, realizing this simple concept is much bigger than most of us suppose.<sup>105</sup> We wonder how the law leaves room for this potential.

The challenge is not merely related to achieving equity. Indigenous issues in relation to Canada, at their core, are not equity issues, which are most often institutionally restricted to the popular and legal vocabulary of ‘rights’ – the right not to live in dire poverty, the right not to be

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<sup>102</sup> Report of the Royal Commission on Aboriginal Peoples, *Volume 2: Restructuring the Relationship* (1996), online: <<http://data2.archives.ca/e/e448/e011188230-02.pdf>> at 263.

<sup>103</sup> See esp the concluding words of the majority judgment in *Delgamuukw* at the supreme court state: “Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet, supra*, at para. 31, to be a basic purpose of s. 35(1) -- “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.” “Let us face it, we are all here to stay” (*Delgamuukw v British Columbia*, [1997] 3 SCR 1010). We acknowledge the many scholars who point out, rightly, the limits of the law inherent in *Delgamuukw*, including Dale Turner, “Indigenous Knowledge and the Reconciliation of Section 35(1)” in Patrick Macklem and Douglas Sanderson, eds. *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016). See also Michael Asch, John Borrows and James Tully, eds. *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018).

<sup>104</sup> Donna Carriero, “Beyond 94: Where is Canada at with reconciliation?” CBC News (19 March 2018), online: <<https://www.cbc.ca/news/indigenous/beyond-94-truth-and-reconciliation-1.4574765>>.

<sup>105</sup> *Ibid.*

subjected to racist discrimination, the right to harvest fish in clean water, the right to one's territories, and so on.<sup>106</sup> Even if these rights were somehow addressed (as they should be, and are still not), reconciliation would not necessarily have occurred, nor can it occur with only these kinds of aims in mind. People can coexist on a relatively equitable worldly status without being friends, and have even gone to war with many rights well in place on both sides.

True friendship as we understand it requires something much higher than material wellbeing, or a mere declaration of respect or affection. True friendship stems from deep in our hearts, and involves a very real mutual understanding as the basis for reciprocally meaningful actions. And so reconciliation requires something much higher, or more inward, than anything that any Canadian court currently seems to have the capacity to address. Canadian legal systems speak the language of rights mostly at an externalized and compartmentalized material level: What do (or did) people own or occupy? How can we prove it? Who says so, or has said so in the past, so that we know it to be true, whether this is in a written form or an oral tradition? How does the behaviour of one actor affect or transgress the rights of another? And even, how much do the interests of one weigh compared with those of the other? Canadian courts seem less interested, to say the least, in matters of the heart and spirit. As long as we remain in these lower realms of law, many decisions can be overturned and any human interpretation of a decision may easily contradict any other. Even "final" decisions at the highest level, as with *Delgamuukw*, are interpreted in radically different ways on the ground and in lower courts, depending on diverse human perspectives.

Spirituality lies at the inmost core of Indigenous perspectives on the law and rights, and frames all our human laws in relation to transcendent principles, which are often referred to by diverse Indigenous people as "Original Instructions." Consider for example the First Nations Water Declaration in Ontario issued by the Chiefs of Ontario, which begins by referencing our placement here by the Creator, emphasizing our responsibilities and gifts (both given to us and held by us, and needing to be shared), the importance of our ceremonies, the principle of respect, the spirit of the waters, our relationships with those waters in every direction, our sacred instructions to protect the gift of water, and so on, finally arriving at the idea of Indigenous human rights midway through the document.<sup>107</sup>

The Canadian view on rights very often forces Indigenous people into a kind of zero-sum game, pitting different human groups against one another in a struggle over what might more properly be called privilege rather than rights and leaving other, non-human levels of being almost completely out of the equation, unless they are considered as some adjunct of *human* rights.<sup>108</sup> Even modern attempts to recognize the rights of nature are generally limited to human and "ecological" (i.e., material versus spiritual) perspectives.<sup>109</sup> Indigenous views begin by centering

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<sup>106</sup> See note 29.

<sup>107</sup> Chiefs of Ontario, "Water Declaration," First Nations Water Policy Forum (15-17 October 2008), online: <<https://www.afn.ca/uploads/files/water/08-10-00.pdf>>. It is notable that this declaration comes through political actors who represent not merely "traditional" perspectives, but the full range of people living as Status Indians in their territories, and so is far from being the most radical statement on this kind of theme; in the context of these territories at least, this declaration is issued through a rather "mainstream" entity.

<sup>108</sup> See note 29.

<sup>109</sup> There is no room in this article to address the recognition of the "rights of nature" and the implications for Canadian park spaces. For more on this topic, see e.g. Clark, Cristy, Nia Emmanouil, John Page, and Alessandro

us in ways that transcend the struggle over who owns what or who controls how much in mere human or material terms, into a realm where we are all given gifts and responsibilities by the Creator, extending in every direction, and which, when respected and practiced, will help ensure that we and future generations will continue to benefit.

Canadian governments have not yet begun to truly understand Indigenous communities and languages. In contrast to New Zealand, for example, Canadian governments operate almost completely outside of higher laws, such as the need for reciprocity in all things, and reduce everything to the level of who is entitled to what.<sup>110</sup> There may be apologies between humans, some acknowledgment of the other’s trauma, the assignment of money and so on; but these acts proceed from within a system that is merely human, and which still neglects any deeper meaningful mutual connection and understanding, not only with Indigenous people, but also with the whole world, and with the Creator. The modern world myopically limits our circle of relationships to the human level, and even at this radically reduced level we cannot really see the other person as sacred, as we would our own child or brother or mother,<sup>111</sup> or a beloved friend. On this basis we are unlikely to deeply consider how the other feels, thinks, and is motivated to move in this world, and *then* stand by them in a meaningful relationship. At best, we currently have a superficial and fragile friendship and a limited capacity for relationship building.

### ***Indigenous laws and settlor legal systems***

Indigenous laws are not primitive manifestations of law, nor can they be met through belated acts of social justice.<sup>112</sup> The City of Toronto could not possibly compensate for the horrors that have already taken place. Nor is the question of how Indigenous peoples are consulted in municipal planning a mere matter of rights or treaties as conceived under western legal concepts. If we are to address urban issues in a meaningful way, then we are also looking at resolving interconnected crises – environmental, economic, social, intellectual and spiritual - in ways that radically and holistically challenge all our human systems. What is really at stake is how we may all survive in sustainable ways for generations to come, regardless of our human status as Indigenous or non-Indigenous.

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Pelizzon. “Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty Gritty of Governance” (2019) 45(4) Ecology Law Quarterly 787-844 and Jeremy Lurgio, “Saving the Whanganui,” *The Guardian* (29 November 2019), online: < [https://www.theguardian.com/world/2019/nov/30/saving-the-whanganui-can-personhood-rescue-a-river?CMP=Share\\_iOSApp\\_Other](https://www.theguardian.com/world/2019/nov/30/saving-the-whanganui-can-personhood-rescue-a-river?CMP=Share_iOSApp_Other) >.

<sup>110</sup> In New Zealand, the rights of nature under Maori jurisprudence are much more advanced when it comes to consultation. Settlor governments must establish and maintain opportunities for Māori to contribute to decision-making processes. Before making any significant decision relating to land or a body of water, local authorities must by law take into account “the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu [sacred sites], valued flora and fauna, and other taonga [cultural treasure]” (New Zealand, Resource Management Act 1991, s 6(e)).

<sup>111</sup> The use of terms such as “brother”, “father” and so on in covenants and treaties has profound meaning (Francis Jennings, William N Fenton, Mary A. Druke, David R. Miller (eds.), *The History and Culture of Iroquois Diplomacy* (Syracuse: Syracuse University Press, 1985).

<sup>112</sup> John Borrows, “Indigenous Legal Traditions in Canada” (2005) 19 Washington University Journal of Law & Policy 167; Val Napoleon and Hadley Friedland, “Indigenous Legal Traditions: Roots to Renaissance” in Markus D. Dubber and Tatjana Hörnle, eds. *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014).

Friendship is not only about accepting another's point of view, but also being able to admit when one is wrong, and being able to change one's own perspective and actions accordingly. This will mean stepping outside of established Canadian law and legal frameworks, and understanding and integrating with Indigenous laws *in spirit*, i.e., at the level of their highest principles. For example, in many Indigenous cultures there are laws of non-interference or taking only what you need, rooted in natural law.<sup>113</sup> The law is explained in stories, which requires openness to reasoning and knowledge beyond what is found in Canadian jurisprudence. The idea that stories are the basis for law may seem baffling to many today, but on serious reflection, we can see that even at the most mundane levels, the law is driven by stories. As John Borrows notes, the law is "in the stories,"<sup>114</sup> which in turn are valuable precisely because they are symbolic and reflect higher intellect and integrated understanding of the universe, rather than being narrowly prescriptive.<sup>115</sup> Each person's interpretation and every layer of being is seen as having truth, as part of the truth. As Elder Harry Bone says, "We can't speak by ourselves."<sup>116</sup>

Traditional Indigenous laws are ultimately everyone's laws.<sup>117</sup> It is in the interest of all to consider how Indigenous laws and practices can inform the healthy evolution of the legal system. Borrows highlights the integration of economic and ecological factors in site plan development. Ideas of designing to scale (using only what you need), replenishing and restoring the natural surroundings in the area of development after its construction (leaving gifts in respect for the taking of the things formerly living there), and having a plan for future care of the site after its construction (placing a good watchperson over the things you have changed) are only a few of the many Indigenous legal principles that can apply to land use planning.<sup>118</sup>

Anishinaabe Nibi Inaakinogewin (Anishinaabe water law) serves as a rich framework for how Indigenous and settlor legal systems might come to act in friendship. Anishinaabe legal scholar Aimee Craft's report on Anishinaabe Nibi Inaakinogewin<sup>119</sup> affirms the importance of higher laws and spiritual realities as the framework for human laws.<sup>120</sup> The document supports the importance of relationships as the basis for obligations, responsibilities and "rights", and the elders stress that "Anishinaabe law is centred around relationships."<sup>121</sup> Our responsibility "to

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<sup>113</sup> Napoleon & Friedland, *supra* note 113.

<sup>114</sup> John Borrows, "Living between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47:4 *The University of Toronto Law Journal* 417 at 428-9, "Indigenous laws sometimes find their expression in traditional stories, which are a primary source to discover precedents guiding environmental and land-use planning. These narratives often pre-date the common law, have enjoyed their persuasiveness for centuries, and have yet to be overturned or extinguished from the tribal memory."

<sup>115</sup> Aimee Craft, *Anishinaabe Nibi Inaakinogewin Report: Reflecting the Water Laws Research Gathering conducted with Anishinaabe Elders* (University of Manitoba: Centre for Human Rights Research CHRR and the Public Interest Law Centre, 2014), online: <[http://create-h2o.ca/pages/annual\\_conference/presentations/2014/ANI\\_Gathering\\_Report\\_-\\_June24.pdf](http://create-h2o.ca/pages/annual_conference/presentations/2014/ANI_Gathering_Report_-_June24.pdf)> at 20, 22-23.

<sup>116</sup> *Ibid.* at 18.

<sup>117</sup> Borrows, *supra* note 115 at 463.

<sup>118</sup> *Ibid.*

<sup>119</sup> Craft, *supra* note 116.

<sup>120</sup> *Ibid.* at 44.

<sup>121</sup> *Ibid.* at 9.

each other and to the land”<sup>122</sup> must be lived, *is* the law, and this law is “all around us.”<sup>123</sup> The laws we need to follow unfold and breathe, as alive as everything around us.<sup>124</sup>

Anishinaabe Nibi Inaakinogewin illustrates how laws extend far beyond “ecological” or “human rights” and touch on everything conceivable in our world. For example, democratic legitimacy has the potential to benefit from a deep relationship with Indigenous laws. Anishinaabe scholar John Borrows observes the potential of Indigenous laws and perspectives for reinvigorating governance and democracy in general. The emphasis by many Indigenous laws on processes that support the broader sharing and understanding of information is in contrast to modern Western tendencies to remote governance and technocratic decision making that is imposed without general understanding.<sup>125</sup> As John Borrows and others have noted, Indigenous accounts of law have particular benefit to settler society, including the way in which such laws adopt a multi-generational approach to decision making. He states, “Placing Indigenous accounts of law within and beside ‘western’ interpretations of contemporary customary law encourages more inclusive democratic conversations, neither separate from nor entirely included within more formal rule-based discourses.”<sup>126</sup> This is just one example of how Indigenous law is increasingly relevant and applicable in any modern context.

### *The inadequacy of the duty to consult*

Working towards city recognition and embrace of the inner meaning or spirit of Indigenous laws can help transcend a Canadian tendency to rely on reductive interpretations of the duty to consult. The decision in *Neskonlith* reflects an inability to meaningfully engage with Indigenous laws in understanding the roles and actions of local governments.<sup>127</sup> Saying that municipalities have no resources or mandate to grapple with duty to consult and are not the Crown focuses on the jurisdictional boundaries created under the Canadian constitution. The priority accorded to ‘resources’ and ‘mandate’ at their lowest, most mechanical level is a bureaucratic abdication of responsibility and relationship found in Indigenous laws. If we are to be friends, then the whole conversation must be raised above this bureaucratic level, for all our sakes.<sup>128</sup>

City governments can and do make final decisions in areas like parks management.<sup>129</sup> In these and other areas of action, the courts are increasingly showing deference to municipal decisions through principles such as subsidiarity and cooperative federalism. As Hoehn and Stevens note:

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<sup>122</sup> *Ibid.* at 12.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.* at 9.

<sup>125</sup> *Ibid.* Elders in Craft's report refer very specifically to seven sacred principles for leaders and to governance processes for selecting leaders that are governed by natural law and involving clan mothers. They emphasize the importance of key people hearing and understanding what is being decided on.

<sup>126</sup> Borrows, *supra* note 8 at 33-34.

<sup>127</sup> Hoehn & Stevens, *supra* note 3 at 13.

<sup>128</sup> *Ibid.* at 14 (highlighting the *Neskonlith* ruling and the link between municipal failure to consult and a lack of capacity, with the court describing “municipalities as varying greatly in size and tax-base, and as being generally concerned with the regulation of privately-owned land, with Crown land and natural resources remaining within the purview of the Province”).

<sup>129</sup> *City of Toronto Act, 2006*. S.O. 2006, chapter 11. Schedule A.

The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. The 'benevolent' and 'strict' construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters. This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes.<sup>130</sup>

The honour of the Crown resides ultimately in the conduct of individuals, regardless of the particular governments they represent.<sup>131</sup> Covenants and treaties can offer a path forward for relationship building. For example, in Toronto, we may ask: How do we all approach the Dish with One Spoon Treaty and share the territory in a sustainable manner? Even if this agreement could be argued (as it most certainly would by some) as historically or regionally limited in its applicability, we can still ask how we might all renew such an agreement, or enter into new covenants reflecting the same higher principles. The conversation can transcend the usual limitations Canada places on Indigenous knowledge as an adjunct considered mainly in relation to endlessly disputed numbered treaties and other territories considered narrowly, and move into a place where that knowledge is seen as part of the whole legal environment, and of every scrap of land and drop of water and breath of air around us.<sup>132</sup> None of this would need to abandon or radically revise existing treaties; indeed, it has been well argued that Indigenous interpretations of existing treaties already differ from Canadian interpretations in the ways being suggested above, and that they have differed in these ways since the treaties were made.<sup>133</sup> These kinds of questions would shift the ways in which agreements, like those along the Humber, are worded and negotiated.

## V. Moving forward: Indigenous law and the Humber

The City of Toronto has taken some positive steps in its workings with Indigenous peoples along the Humber, largely by listening and moving slowly. Approaching a legitimate agreement reflecting real friendship, however, is more than environmental assessments and heritage, and preoccupations with insurance and plant names. It requires giving municipal teeth to Indigenous laws by recognizing UNDRIP.

A recognition of Indigenous laws in Toronto would fundamentally ask how we may all come to sit together in the city, including Treaty holders for the territory from nearby reserves, as well as diverse Indigenous and non-Indigenous people living in the city itself. It would articulate what it means to establish a deeply balanced relationship with our place, in ways that offer a taste of

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<sup>130</sup> Hoehn & Stevens, *supra* note 3 at 18-19 (quoting *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19).

<sup>131</sup> *Ibid.* at 12-13.

<sup>132</sup> Borrows, *supra* note 112 at 443.

<sup>133</sup> Aimee Craft, "Treaty Interpretation: A Tale of Two Stories," Draft Thesis Chapter (April 6, 2011), online: <[http://www.cba.org/cba/cle/PDF/ABOR11\\_Craft\\_Paper.pdf](http://www.cba.org/cba/cle/PDF/ABOR11_Craft_Paper.pdf)>.

how Indigenous perspectives are an essential element in the process, of demonstrable benefit to all people. Such a process need not move through any legislated or adversarial approach, but rather by setting aside areas where new relationships may emerge and become culturally embedded over time - grown from within communities rather than imposed from outside of them.

Several steps are needed. First, there would need to be recognition that Indigenous laws exist, and that these laws derive from natural laws.<sup>134</sup> If we recognize this, then we are absolutely under the same authority, rather than one being under the other’s jurisdiction. Second, we would ask which Indigenous laws inform today’s contexts, and how they can be recovered within these contexts in ways that address common concerns. Broadly put, how can our shared presence in this part of the world become part of a sustainable and balanced way of living? Finally, we would need to establish a way for both Indigenous peoples concerned as well as Canadian municipal officials and all people living in the city to adapt their diverse perspectives toward this common framework in ways that respect their realities. We would need to renew covenants that have been broken or have lain sleeping for many decades, even centuries.

There are obvious challenges to recognizing Indigenous laws in Toronto. This daunting work cannot be done all at once. Canadian society and systems in general are very detached from the possibility of referencing the principles that underlie Indigenous laws in any public forum, most especially in relation to education and policy-making. The events and processes unfolding along the Humber River offer an important example of how to start.

In Toronto, many of the measures introduced to promote reconciliation do not substantively address colonialism. The City Statement of Commitment focuses on the usual array of issues Canadian governments typically attempt to address through the standard equity lens – silos of concern defined completely by Canada: employment, economic development, housing, health and education. Even support for opening ceremonies is usually not about nation-to-nation relationships so much as being taken at the level of a kind of mere mechanical formality, or culturally sensitive practice. The Indigenous Affairs Office’s Year of Truth and Reconciliation and so on are also not bad developments in themselves, but have very little to do with substantial reconciliation if the bigger questions of how we are to survive and share the territories where we live is not addressed. Similarly, the training of city staff on Toronto’s Indigenous history is necessary, but is more of a sensitivity and equity exercise, and less of a recognition or respect for Indigenous laws, nor does it set a path forward that displaces the centrality of the City of Toronto’s authority.

The City of Toronto’s adoption of UNDRIP is very significant, however, although to one city official, “no one realizes what it means.”<sup>135</sup> UNDRIP articles 25 and 26 are particularly important, and clearly assert the right of Indigenous peoples to “maintain and strengthen their distinctive spiritual relationship with their traditionally owned or *otherwise occupied and used*

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<sup>134</sup> Lindsay Keegitah Borrows, *Otter’s Journey through Indigenous Language and Law* (Vancouver: University of British Columbia Press, 2018).

<sup>135</sup> See note 79.



lands... and to uphold their responsibilities to future generations in this regard." (italics added)<sup>136</sup> These articles emphasize the importance of spiritual relationships and responsibility. To be meaningful, the adoption of UNDRIP must be more than a mere endorsement of principles and, instead, must serve as the basis for a renewed relationship with Indigenous peoples in the city.

Indigenous peoples are occupying and using a small stretch of the Humber River in a manner that is grounded in Indigenous law, at least, to the extent possible, given the fallout from Canadian policies of genocide and assimilation, including revitalizing the natural ecosystem of the area, lighting fires and conducting ceremonies. Indigenous peoples in Toronto have been invited and encouraged by Anishinaabe Elders and ceremonialists from the territory to light fires, and have asked with tobacco, and received the Thanksgiving Address of the Haudenosaunee people in support of their presence there. Indigenous peoples are modeling responsibility to the Humber with future generations in mind. No one is parked on anyone's valued property, and those involved have occupied sites that are considered as public property under Canadian laws, albeit neglected by local authorities for at least 60 years, filled with waste and overrun with invasive species. In this urban setting, with the land, water, plants, birds, animals, fish, ancestors, descendants, spirit, Indigenous peoples are relating to place according to Indigenous laws, to the best of their ability.

Before any agreement is signed between Indigenous peoples and the municipal government, there must be an explicit acknowledgement of Articles 25 and 26 of UNDRIP, together with mention of the specific covenants and treaties that apply. First Nations, including the Michi Saagiig Nishnaabeg, must be very specifically and intentionally involved. On this basis, Indigenous-led processes and resurgence along the Humber River and in other urban parks can be used as a kind of model or precedent for how the recognition of and movement back toward higher laws can be applied. Other colonial legal systems have afforded legal recognition of such areas.<sup>137</sup> Spaces of legal recognition for urban Indigenous spaces like the ones along the Humber River can serve as sites for the practice of Indigenous laws. In making this recognition explicit, small but significant microcosms of reconciliation can be built, seeds that can grow naturally across the urban landscape.

## Conclusion

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<sup>136</sup> See UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: <https://www.refworld.org/docid/471355a82.html> [accessed 17 December 2019], which states at Article 25:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard; and Article 26: (1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired; (2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise; and (3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

<sup>137</sup> See reference to "res divini juris" in William Smith, "Dominium," *A Dictionary of Greek and Roman Antiquities* (London: 1875), online: [http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA\\*/Dominium.html](http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Dominium.html).

This paper has explored the urgency of Indigenous-municipal relationships and the uncertain legal obligations that cities have in relation to Indigenous peoples and First Nations. Presently, provincial and federal governments are considered to be the Crown, and municipal governments are simply creatures of the province, meaning that a municipal responsibility to carry out the procedural requirements of the duty to consult and accommodate may be delegated by provinces. Considerable uncertainty remains as to the municipal role in relation to Indigenous peoples under the law; but municipal authorities also have a less remote relationship to urban Indigenous neighbours than large provincial or federal branches of Canadian government, and so may have a better chance at true friendship. This article challenges municipalities to look beyond existing legal principles to build reciprocal, respectful relationships with Indigenous peoples and communities. We focus on activities led by Indigenous peoples taking place in an urban park space within the City of Toronto, including the planting of traditional plants and the presence of various ceremonies, the ways in which the municipal government has reacted to these activities, and the potential for new kinds of legal relationships.

We suggest that Toronto's approach to Indigenous-municipal relationship building and governance through the adoption of UNDRIP is especially meaningful in moving forward, in particular articles 25 and 26, which assert the right of Indigenous peoples to maintain and strengthen their distinctive spiritual relationship with traditionally owned or otherwise occupied and used lands, and recognize Indigenous responsibilities to future generations, which includes future generations of all urban people. As applied to the park space explored in this article, these sections of UNDRIP offer a lens through which Indigenous peoples and communities and municipal governments may rethink their relationships in a manner that recognizes their respective histories, shared interests, and Indigenous environmental expertise and laws. In doing so, the city can enable Indigenous peoples to continue their work in recovering and maintaining their relationships with land and water, with place in the deepest possible sense. If this can be achieved, however modestly at first, it can deeply inform and influence how our children and grandchildren may still come to live in more sustainable ways, in balance with all things that surround us, and in harmony with laws that have been in place since the beginning of this world.